ROMAN CANON LAW IN REFORMATION ENGLAND

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THE MEDIEVAL INHERITANCE

In the middle of the fifteenth century, the courts of the Church exercised jurisdiction over broad though not unlimited areas of English life. The principal boundaries of that jurisdiction must have seemed well settled at the time. At least they had been long observed, in fact since a time of dispute and settlement more than one hundred and fifty years before, during the reigns of Edward I and his son.[1] A few matters of serious contention with the courts of the King did exist, flaring into occasional dispute when the stakes were high enough. There were also many matters of disagreement that *could* have separated the courts of Church and Crown, had either side attempted to implement the full extent of its jurisdictional claims. But this did not happen. The surviving records reveal a remarkable stability in the subject matter jurisdiction of the English courts Christian.

As things stood, the ecclesiastical courts dealt with all questions involving the formation and annulment of marriage. That is, causes (the canonical word used for law suits) brought to enforce contracts of marriages entered into by words of present consent, to secure judicial separations on the grounds of adultery or cruelty, and to dissolve *de facto* marriages contracted contrary to the canonical impediments, all belonged to the courts of the Church. So too did exclusive probate jurisdiction in most parts of England. The ecclesiastical tribunals proved all last wills and testaments not involving freehold property, and they supervised the collection of the assets of decedents and the payment of debts and legacies out of those assets. Moreover, the courts of the English Church provided the sole remedy available for defamation. The royal courts offered no relief except in special

[1] See *Councils & Synods* I:107. See generally the judicious survey by Robert E. Rodes, *Lay Authority and Reformation in the English Church: Edward I to the Civil War* (1982) 12–46.

situations, and the local courts in England had themselves withdrawn from the field over the course of the fourteenth century. The ecclesiastical courts also exercised an important jurisdiction over sworn oaths or perjury. In practice this had become a means of enforcing simple contracts to which an oath had been added to the promise. And finally, the ecclesiastical courts heard causes involving tithes and what would come to be called church rates. These included suits arising out of failure to pay tithe, the tenth of the yearly increase of crops, herds, and industry which every Christian in theory owed to his parish church, and also causes dealing with the charitable oblations that the twin springs of custom and piety had fastened upon the average Englishman.

These were the five principal heads of the Church's civil or 'instance' jurisdiction. Several additional, though more minor matters, also came within the civil cognizance of the English ecclesiastical courts. One example is the suit to require payment of an annual charge upon an ecclesiastical benefice, the *causa annuae pensionis* that was cousin german to the common law's action of annuity.[2] Another area covered disputes about church property, things like ecclesiastical ornaments or money given for charitable uses. In terms of overall volume, however, the five categories listed above easily dominated the litigation heard in the spiritual courts. For estimating the impact of the Reformation on the canon law in England, they provide an accurate gauge of the instance side of ecclesiastical jurisdiction.

Equally important at the time, however, and equally important now for assessing what happened to ecclesiastical jurisdiction during the Reformation era, was the criminal or *ex officio* side. It consisted of causes begun, in the name of the court itself, against men and women who had publicly violated accepted norms of Christian behaviour. In England, this jurisdiction encompassed offences against morality (such as fornication or public scolding), deviations from the teachings of the Church (such as blasphemy or contempt of the clergy), and

[2] Pensions were defined in the canon law as a 'certain portion taken from an ecclesiastical benefice *ex causa* and *ad tempus*', as for example would be appropriate as a means of paying for having the church bells rung. See Girolamo Gigas (d. 1560), *Tractatus de pensionibus ecclesiasticis* (Venice 1542) Quest. 1, no. 1 and Quest. 3, no. 2. The connection with the action of annuity was made by an Elizabethan common lawyer in Folger MS. V.b.5, f. 177.

offences involving the fabric of individual churches (such as neglect of ornaments or disturbances within churchyards). In addition, much regulation of the large clerical estate belonged to the ecclesiastical courts, and this was normally exercised on the *ex officio* side. Simony, unlawfully holding more than one benefice, and failing to provide the laity with adequate spiritual ministrations thus came within their routine oversight.

In practice there was always some overlap between the *ex officio* and the instance sides of ecclesiastical jurisdiction. Defamation, for instance, could be raised either way, by a 'criminal' proceeding against the individual defamer or by a private suit brought on behalf of the person defamed. Moreover, a hybrid criminal proceeding initiated by a private individual existed. In this, a private individual 'promoted' the court's office jurisdiction. Despite this overlap, the distinction between the 'criminal' and civil sides remained important. Many of the courts' records were separated accordingly, and differences in procedure employed, and occasionally in the substantive law applied, followed from the nature of the jurisdiction invoked.[3] The difference should be remembered at points in tracing the history of the relationship between the Reformation and ecclesiastical jurisdiction.

Probably more important for understanding this subject, however, will be a preliminary discussion of two more general aspects of the spiritual jurisdiction. There are two basic subjects. The first is the relationship of English canonical practice to the formal canon law. The second is its relationship with English common law. Maitland dealt with both in his work on the subject, and indeed they must provide principal themes for any serious study of the place of the canon law in English legal history. The first requires comparing practice with the texts found in what Maitland called 'the papal law books'. The second requires examination of specific examples of competition, conflict, and co-ordination between the two jurisdictions.

[3] For descriptions of English practice, see Henry Conset, *The Practice of the Spiritual or Ecclesiastical Courts* (1685) Pt. VII, c. 2; John Ayliffe, *Parergon juris canonici Anglicani* (1727) tit. 'Of the Office of the Judge'. See also Paul Fournier, *Les Officialités au moyen âge* (1880) 275–8.

ENGLISH ECCLESIASTICAL LAW AND THE PAPAL LAW BOOKS

This first of these two subjects led Maitland to one of his most celebrated controversies.[4] He entered into it to combat the arguments of contemporary apologists for the Church of England. These apologists, led by Bishop Stubbs, sought to use the history of ecclesiastical jurisdiction to demonstrate the continuity of the English Church; to demonstrate (in Maitland's witty sally) that the Church of England was Protestant before the Reformation and Catholic after it. The canon law played a pivotal role in this controversy, because Bishop Stubbs and the other Anglican spokesmen argued that during the Middle Ages the English ecclesiastical courts had been able to follow a line independent of the Papacy. In their view the Reformation Settlement in fact built on established principles and was no true innovation. The men who administered the English ecclesiastical courts, they contended, had regarded the canon law of Rome with great respect, but had never felt themselves bound to apply it. They could enforce parts of the decretal law and disregard others, as suited local needs and preferences. Thus the English Reformation represented no sharp break with medieval tradition.

Maitland found little to be said in support of this position. Every piece of evidence he examined showed the medieval English Church absolutely dependent upon papal law. The evidence that supported English 'independence' all turned out to be taken from cases where the secular power constricted the ability of the ecclesiastical courts to follow the canon law.[5] What was needed to prove the contrary argument, Maitland contended, was a situation where the ecclesiastical courts acted contrary to the formal canon law and where they were not constrained to do so by royal writs of prohibition or the threat of *Praemunire*. Of this he saw no sign. Instead, where their hands were free, the courts invariably followed the Roman canon law. Indeed, the

[4] See *Roman Canon Law*, which collects his articles on the subject. Bishop Stubbs' views are found in *Report of the Commissioners into the Constitution and Working of the Ecclesiastical Courts*, Vol. 1 (1883). The controversy has generated a scholarly literature over the years, reviewed and added to by Charles Donahue, Jr, 'Roman Canon Law in the Medieval English Church: *Stubbs* vs. *Maitland* Re-examined after 75 years in the Light of some Records from the Church Courts', *Michigan L. Rev.* 72 (1974) 647–716. See also G. R. Elton, *F. W. Maitland* (1985) 69–79; Hermann Lutz, *Das Canon Law der Kirche von England* (1975).

[5] See 'Church, State, and Decretals', in *Roman Canon Law* 53–5.

English ecclesiastical lawyers treated the papal decretals as 'binding statute law'. To talk of the medieval Church of England as 'departing from the church of Rome and evolving a jurisprudence of her own', Maitland argued, was contradicted by all the available evidence.[6] Indeed it was dangerous nonsense.

It will not be the purpose of this book to enter at length into this by now ancient controversy, still less to attempt to breathe life into the argument that the English Church considered itself 'independent' of papal law during the Middle Ages. Put that way, the argument is anachronistic and even silly. Not even Stubbs took so extreme a view. And if put to choose between the positions of Maitland and Stubbs, we would certainly be right to follow Maitland. However, it *will* be my argument that the choice need not be made, at least in the stark form the original controversy took. In the years since Maitland wrote, a great deal has been discovered about the kinds of litigation actually heard in the medieval ecclesiastical courts. The record evidence which Maitland knew existed but could not himself explore has been examined. Moreover, it is also possible to take a slightly longer look at the nature of the Roman canon law than Maitland was able to manage. He himself claimed only a 'toe in the water' sort of familiarity with its traditions.[7] A study of both of these puts the matters at issue between Stubbs and Maitland into a different light. And it is a clearer light, I think, by which to discern what happened to the Roman canon law during the era of the English Reformation.

The character of English litigation

English ecclesiastical jurisdiction as put into everyday court practice during the medieval period contained a mixture of things, some of which were almost perfectly consistent with what was found in the 'papal law books', some of which were not. The largest part fell somewhere in between. Looking seriously at this sometimes awkward, sometimes close, fit between formal law and court practice will show the difficulty of some of the assumptions both Maitland and Stubbs brought to the original controversy.

[6] *Ibid.* 59, and 'William Lyndwood', *ibid.* 3–4.

[7] See Maitland, 'Canon Law in England: A Reply to Dr MacColl', *E. H. R.* 16 (1901) 35–45, reprinted in *Collected Papers of Frederick William Maitland* (1911) III:145.

The law of marriage and divorce demonstrates general conformity between theory and court practice. The canon law defined a valid and indissoluble marriage as any union contracted by words of present consent.[8] No formal ceremony, parental consent, or sexual consummation was required. The English courts enforced this consensualist view of marriage, even though it was not entirely consistent with the sentiments, or at least the habits, of the English people.[9] The canon law texts also treated as legitimate any children born to parents whose marriage was subsequently dissolved, provided that the parents had entered into the marriage in good faith.[10] The English ecclesiastical courts, here again, followed the canon law's view of legitimacy even though not all laymen would have agreed with it.[11] Thus, one can say that although English practice left room for a few local peculiarities, and although family law must always be subject to some bending by the desires and the needs of litigants, the canon law of marriage as found in the Decretals was regularly enforced by the English spiritual tribunals during the Middle Ages. It fits Maitland's picture of papal law as binding statute law.

The law of defamation and the law of wills, however, do not. They stood outside and even appear to have contradicted the texts of the papal law books. Defamation in medieval English practice meant the malicious imputation of a crime. If a man merely accused his neighbour of professional incompetence or fastened a personal 'defect' like illegitimacy or leprosy upon him, the Provincial Constitution enacted at the Council of Oxford in 1222, which determined the medieval English law of defamation, provided no remedy.[12] Papal decretals, however, authorized broader principles of relief. Following the Roman law's *actio iniuriarum*, decretal law allowed a legal remedy for any abusive language that caused harm to a person's reputation.[13]

No royal interest would have prevented the medieval English Church courts from enforcing this broader concept of defamation found in the papal law books. No prohibition lay to prevent a spiritual court from hearing a slander case where a mere 'defect' had been

[8] X 4.1.31; see generally A. Esmein, *Le Mariage en droit canonique* (1891) I:95–137.
[9] R. H. Helmholz, *Marriage Litigation in Medieval England* (1975) 27–40.
[10] X 4.2.8. [11] *Marriage Litigation* 98–100.
[12] Lyndwood, *Provinciale* 347 s.v. *crimen*.
[13] X 5.36.9. This question is discussed at more length in S.S., Vol. 101 (1985) xvi–xx.

imputed or where the slanderous language had merely held the plaintiff up to 'hatred, ridicule and contempt'. However, such cases do not appear in the surviving medieval records. The law regularly applied in court practice was based on English provincial law, and this means that in the law of defamation, one does truly see ecclesiastical judges whose 'hands were free' following a rule of law contrary to that found stated in the papal law books.

Testamentary law in medieval English practice similarly diverged from what one would expect from reading the texts of the Roman canon law. Not only did the jurisdictional pattern differ from the unified system of administration and heirship followed on the Continent and sanctioned in the formal canon law,[14] English practice also allowed probate of virtually any testament that could be satisfactorily proved to represent the last wishes of the decedent. Thus, the testimony of two witnesses to an oral or nuncupative will, perhaps even less, would suffice to prove the validity of a testament in England.[15] This is not the regime sanctioned in the 'papal law books'. A papal decretal specifically required the presence and the testimony of both two witnesses and that of the decedent's parish priest for upholding the validity of an ordinary testament.[16] By taking this more 'generous' view of testamentary validity, the English spiritual courts seem again to have been refusing to treat the papal law books as 'binding statute law'. And again, no royal court rule required this of them.

This divergence between English practice and the texts of the papal decretals never meant that the Roman canon law was irrelevant to questions involving defamation and wills in England. In fact the reverse was true. Decretal law shaped English practice at many points. Its texts could be, and were, used to answer many of the questions of legal detail upon which lawyers customarily spend their working lives. For instance, in the law of defamation the answer to the question of whether or not malice on the part of the speaker could be presumed from the character of his words came out of the Roman

[14] See generally Michael M. Sheehan, *The Will in Medieval England* (1963) 163–85.

[15] H. Swinburne, *Briefe Treatise of Testaments and Last Wills* (1590) Pt. 4, §§ 21:2, 21:4, 25:8.

[16] X 3.26.10, 11. These testamentary formalities were even mentioned in some English synodal statutes, e.g., Statutes of Exeter II (1287) c. 50, in *Councils & Synods* II:1047. See also Jerome D. Hannan, *The Canon Law of Wills* (1934) 270–9.

canon law.[17] So did the answer to the question of whether specific words in a dead man's last will and testament were legally sufficient to constitute someone as his executor.[18] English ecclesiastical lawyers had no desire to be 'independent' of the Roman canon law on these and many like points. They used it consistently. Moreover, as lawyers like to do, they sought to rationalize what they did in terms of the law they found in the works of established authority, in this case the works of Continental commentators.[19] Even so, it remains undeniable that on a central issue of practice in the areas of defamation and testaments, English practice was not what one would expect from enforcing the texts of the papal law books.

The law of tithes provides a good example of a gray area between the identity found in marriage law and the disparity found in the law of defamation or testaments. Tithing practice in England incorporated strong elements of local custom, some of which would have seemed 'out of step' with the formal law. At the same time, however, the practical law of tithes was also greatly informed by the canon law as interpreted by Continental canonists. Its basic requirements were defined by canonical principles, but these principles themselves left a large area in which local custom could prevail.

The medieval tithing customs of the city of London show this pattern. According to these rules, men paid a fixed and small portion of their house rent in lieu of all personal tithes. This seemed contrary to the formal canon law under which all men owed a tenth of their income,[20] and in fact the fifteenth-century English canonist William

[17] Lyndwood, *Provinciale* 346 s.v. *maliciose*. A later example is *Medcalf* c. *Bishop* (Ct. of Arches 1600), Bodl. Lib. Tanner MS. 427, fols. 62–4v; among other authorities, the advocates cited texts from both the Roman and canon law, and works by Angelus de Gambilionibus (d. 1541), Bartholomeus Salicetus (d. 1412), Oldradus de Ponto (1335), Cinus de Pistoia (d. 1336), and Petrus Paulus Parisius (d. 1545). In *Benet* c. *Edwards* (1605), London Guildhall MS. 14488, f. 83v, only Lyndwood and Cod. 9.35.5 (*Si non convicii*) were cited for the same point.

[18] *Broke & Offley* c. *Barret* (1584), BL Lansd. MS. 135, f. 81v–8; cited in addition to the texts were works of Gulielmus Durantis (d. 1296), Bartolus (d. 1357), Panormitanus (d. 1453), Petrus Peckius (d. 1589) and Jason de Mayno (d. 1519). The cause itself also involved other issues.

[19] The discussion by J. L. Barton, in his Introduction to Christopher St German's *Doctor and Student*, ed. J. L. Barton (S.S. Vol. 91, 1974) pp. xxxviii–xxxix, is illuminating. See also Brian Ferme's article in *The Jurist* (forthcoming). For a Continental example on the question of the number of witnesses to a testament required, see, e.g., Joachim Mynsinger, *Singularium observationum iudicii imperialis camerae* (Turin 1595) Lib. I, Obs. 96.

[20] See Susan Brigden, 'Tithe Controversy in Reformation London', *Journal of Ecclesiastical History* 32 (1981) 44–70.

Lyndwood appears to have thought the custom invalid on that account.[21] On the other hand, the London custom could also be defended as a valid composition or way of meeting the tithe obligation. The canon law left considerable latitude to local custom in fixing the exact manner of paying tithes, and it could be argued that the London custom was simply one more example of that latitude.[22] That it reduced the amount the clergy received in tithes rendered it suspect, but not necessarily invalid.

Much the same could be said of the tithe obligation in other parts of England. As one reads through the records of litigation in the ecclesiastical courts, it quickly becomes apparent how large a share of defining the obligation local custom took. The manner of paying praedial tithes and even the existence of any duty to pay personal tithes depended upon habit and agreement as much as they did on correct interpretation of the texts of the papal law books. And this result was not primarily a matter of resistance to tithes on the part of the laity. It was what the courts of the Church themselves put into effect. English practice in the law of tithes, in other words, was something of a mixture of decretal and local customary law.

None of these four instances would have surprised a Continental canonist. He would have been able to harmonize some of them with a permissible reading of the texts of the Roman and canon laws. He would also have been used to some disjunction between legal practice and canonical texts. He would have found it even within contemporary commentaries on the canon law itself, and he would have seen much of the same situation when he looked at legal practice in other lands where the Pope's writ ran.[23] English canonical practice in the areas of defamation, tithes and testaments would not have struck him as unusual.

What might conceivably have surprised Continental canonists looking at English practice was not what ecclesiastical jurisdiction contained, but rather what it did *not* contain. The English Church exercised virtually no civil jurisdiction over the persons of the clergy. Under the canon law, only the ecclesiastical courts could hear civil

[21] *Provinciale* 201 s.v. *negotiationum*. [22] *Ibid.*

[23] On the emotive subject of the legitimacy of payment of infeudated tithes to laymen, for example, see the comments by the Spanish canonist, Johannes de Turrecremata (d. 1468), *Commentaria super Decreto* (Lyons 1519–20) at C. 16 q. 1 c. 68 (*Quoniam quicquid*), no. 7: 'Ecclesia enim sustinet quod milites habent et dissimulat; et quamdiu ecclesia dissimulat non tenetur quis ecclesie residuum decimare.'

suits involving the clerical order. Called jurisdiction *ratione personae*, as opposed to jurisdiction *ratione materiae*, the privilege reached all litigation between parties that did not directly involve feudal tenures.[24] In England, except for the jurisdiction over criminous clerks that Thomas Becket had won by his martyrdom, the ecclesiastical courts themselves ignored this principle. No such causes appear in any of the act books so far discovered. The regular disregard of this aspect of the papal law is all the more striking in light of a clear decision of the Roman Rota in the 1370s that the English practice was invalid. The *domini* of the medieval Church's highest court of appeal explicitly condemned the English custom of conceding subject matter jurisdiction in suits involving clerics to the royal courts.[25] They held it unjustified under any canonical theory. But nothing changed as a result. English custom continued to override the canon law, even after that latter had been specifically defined by the system's highest court of appeal.

Maitland noticed this striking instance of divergence between the Roman canon law and English custom, and he described it as one more example where the King's 'strong hand' tied the hands of the English judges.[26] In formal terms, his view is defensible. Writs of prohibition were available to, and in fact used by, clerics sued before ecclesiastical tribunals in causes where the subject matter fell within temporal cognizance.[27] On the other hand, the entire absence of attempts to enforce this jurisdiction *ratione personae* from the surviving records of the ecclesiastical courts must suggest caution in fully accepting Maitland's explanation. The courts had weapons of their own to counter writs of prohibition,[28] and where both parties to litigation were themselves ecclesiastics, as happened with depressing frequency in actions of debt and trespass, the searcher in the court records might expect to find *some* sign of this vital canonical principle at work. At least he might have a legitimate expectation of seeing it raised. He finds signs of spirited defence of ecclesiastical jurisdiction

[24] X 2.2.1; see also Paul Fournier, *Les Officialités* 64–73.

[25] See *Decisiones antique sacre Romanae Rotae* (1509) No. 840. The *decisio* is discussed in Walter Ullmann, 'A Decision of the Rota Romana on the Benefit of Clergy in England', *Studia Gratiana* 13 (1967) 455–89.

[26] 'Church, State, and Decretals', in *Roman Canon Law* 62.

[27] G. B. Flahiff, 'The Use of Prohibitions by Clerics against Ecclesiastical Courts in England', *Mediaeval Studies* 3 (1941) 101–16.

[28] See 'Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian', *Minnesota L. Rev.* 60 (1976) 1011–33.

in other areas. He finds much canon law applied even though there were common law rules to the contrary.[29] But in this area, there is nothing. Though English bishops occasionally complained about the situation, the searcher finds little to suggest that the bishops' courts attempted to do anything about it. The canonical principle, and the 1370s Rota decision, were apparently dead letters in the English spiritual courts. Civil jurisdiction *ratione personae* remained a matter of theory only in medieval England.

In sum, examination of English ecclesiastical court records shows that in practice the judges tacitly accepted the restriction of ecclesiastical jurisdiction to one based solely on subject matter. The situation, however uncanonical, was tolerated. This means that the record evidence produces several examples where the judges whose 'hands were free' habitually left the texts found in the 'papal law books' unenforced. These divergences between law and practice at the very least invite reassessment of the original controversy between Stubbs and Maitland. Such a reassessment will not show that the ecclesiastical courts in England were 'independent' of papal direction, but it does show a different habit of mind about practice and legal rule than Maitland and his opponents brought to the original controversy.

Both sides to the original controversy thought in terms of the legal theory they knew best, that is the jurisprudence of legal positivism. Either the decretals were regarded as 'binding statute law', or the English church enjoyed an unfettered 'right of accepting some and rejecting others'.[30] For Maitland, as for his opponents, it must have been one or the other. When he found medieval canonists writing that a law's validity was confirmed *moribus utentium*, he concluded that the opinion could only be 'some muddled definition'. In any event it was 'most unfortunate for them'.[31] To Maitland, the *Rota Romana* must have appeared as something like an early day House of Lords.[32] He supposed that once this highest court of appeal had spoken, the diocesan courts would fall into line if they could.

That is not how things worked. The medieval canon law admitted, or at least tolerated, a disparity between formal rule and local

[29] See Charles Donahue, 'Roman Canon Law in the Medieval English Church', note 4 above.

[30] 'Church, State, and Decretals,' in *Roman Canon Law* 81.

[31] 'William Lyndwood', *ibid.* 31. [32] *Ibid.* 43.

customary practice that was hard to grasp in the heyday of Austinian jurisprudence. Indeed it is hard to grasp today. We may be dissatisfied with the descriptive sufficiency of legal positivism, but we are still accustomed to think of law as the command of a sovereign, and we see in the medieval Church a hierarchical system ideally suited to enforce commands. The evidence, however, calls us to think again. It calls us to examine more carefully the law of the medieval Church and the scholarly traditions that grew up and flourished around it.

The character of the Roman canon law

Medieval jurists did not regard the texts of most papal decretals as 'binding statute law' in the sense meant by Maitland. This is evident in learned commentaries on the canon law. It is evident from the internal fate of some of the decretals themselves.[33] It is evident in Continental court decisions, even some of the *decisiones* of the Roman Rota itself. The judges and the canonists habitually treated many of the texts with a freedom that is incompatible with a positivist understanding of law as judicial command backed by legal sanctions.[34] Some of what they did could be classed as 'statutory interpretation' and would not look much different from what happens in any legal regime. However, when one looks closely at specific instances, it becomes clear that they went a good deal further than merely interpreting authoritative commands.

Instances of the freedom which medieval jurists felt in dealing with the texts abound in the literature, but a particularly instructive

[33] E.g., the decretal of Alexander III holding that security for the payment of debts by a decedent's executor must be given before burial of his body would be allowed. See X 2.28.25; *Regesta pontificum Romanorum*, No. 14312 (2nd edn P. Jaffé & S. Loewenfeld eds. 1885–8) II:410. This did not become accepted canon law; see the discussion in *Councils and Synods*, I:489, n. 1.

[34] See René David, Preface to English Edition, *French Law: its Structure, Sources, and Methodology*, trans. M. Kindred (1972) viii–ix: 'It is crucial to remember that for many centuries "the law" as taught in the universities was purely an ideal law . . . While the rules of the ideal law were never entirely adopted, the rules developed by the government and the courts were never regarded by scholars, or by public opinion, as the law. This concept is difficult for the common law lawyer to understand, inasmuch as the common law is tied by definition to the work of the courts.' See also Joseph Canning, *The Political Thought of Baldus de Ubaldis* (1987) 64–8; Eric Waldram Kemp, *An Introduction to Canon Law in the Church of England* (1957) 11–32; Luigi Lombardi, *Saggio sul diritto giurisprudenziale* (1967) 119–25.

example is provided by one of the questions already mentioned, on which English practice diverged from the formal texts. That is the question of how many witnesses must be present at the execution to allow a court to treat a last will and testament as legally valid. The texts of the two papal decretals on the subject seem clear enough. There must have been two trustworthy witnesses plus the parish priest present at the time an ordinary last will and testament was made for it to be probated.[35] If a bequest *ad pias causas* were at issue, however, then the presence and testimony of 'two or three legitimate witnesses' would suffice.[36]

These two decretals never functioned as modern lawyers expect statutes to. In the hands of medieval commentators, they and the Roman law on the subject led to speculation, distinction, and disagreement. How many witnesses were to be required became a *quaestio dubitabilis*,[37] a *quaestio perdifficilis*.[38] On the one hand, the civil law's rules requiring the solemnity and certainty afforded by several witnesses were evidently 'just and for the common utility'. Perhaps they were to be preferred.[39] On the other hand, the law's paramount goal was to establish and enforce the testator's true last wishes, and the testimony of two persons or sometimes even fewer ordinarily sufficed to do this. At least in the forum of men's conscience nothing mattered except the intentions of the testator,[40] and this implied a more relaxed standard, perhaps more relaxed than that provided in the two decretals. Antonius de Butrio (d. 1408), for instance, held that the testimony of only two unimpeachable witnesses would be enough. He reasoned that the underlying rationale, 'the mind' of the decretal was what counted, and that the mention of the parish priest was a matter of accident, not substance.[41] Hence two witnesses sufficed. Other canon-

[35] X 3.26.10. [36] X 3.26.11.

[37] Alexander Tartagnus (d. 1477), *Consilia* (Frankfurt 1575) Lib. I, Cons. 41, no. 5.

[38] Franciscus Mantica (d. 1614), *Tractatus de coniecturis ultimarum voluntatum* (Turin 1631) Lib. II, tit. 14. proem.

[39] *Ibid.* nos. 1, 4.

[40] *Ibid.* no. 23: 'Deus non curat nisi de intentione testatoris', speaking here of the internal forum.

[41] *Commentaria in quinque libros Decretalium* (Venice 1578) at X 3.26.10, no. 3: 'Ego credo quod mens istorum textuum sit quod valet testamentum etiam cum duobus testibus sive sit ad pias causas sive non ... et quod dicit de presbytero loquitur secundum consuetudinem et accidentia facti.'

ists took a stricter view, some even holding that a higher standard than that found in the decretal should be required.[42]

Complicating the matter, at least on the Continent, was the vexed question of which court system was the proper forum for probate and the existence of many local statutes regulating the law of succession. Testamentary law was not a strictly spiritual matter under the *ius commune*, and there was variety of approach in various parts of Europe. Commentators took these factors into account. They strove to fit the pieces together. They tried to arrive at the just solution, balancing both texts and policy. In other words, what would look to be a fairly straightforward question if one took the decretals as statutes in the modern sense in fact became a much more complicated inquiry in the hands of the medieval commentators.

Any student of the medieval Roman and canon laws must be struck by how often this situation recurred. Many important legal questions were subject to doubt, discussion and dispute. Were personal tithes owed to the clergy *iure divino*, or could they be abrogated or diminished by prescriptive non-payment?[43] Could a child's share of his deceased parent's estate be taken away, either wholly or in part, by statute or local custom?[44] Even many a minor point – what penalty was to be meted out to a man who had kissed a mature but unwilling virgin in the streets of Naples? – was capable of causing lengthy scholarly controversy.[45] About these, and many other questions, the *doctores* were *varii et diversi*.[46] Sir Edward Coke's complaint that the tradition of the Roman canon law tradition was a 'sea full of waves' is amply confirmed by comments of writers from within that tradition.[47] As one

[42] The *locus classicus* for discussion of the various opinions on the subject is X 3.26.10; see, e.g., Panormitanus, *Commentaria in libros Decretalium* (Lyons 1562) ad id. He personally rejected de Butrio's solution, but argued that the presence of two additional witnesses might take the place of the parish priest. See also Angelus de Gambilionibus (d. post 1451), *Tractatus in materia testamentorum* (*T.U.I.* VIII:1) Pt. 1, no. 16.

[43] See Petrus Rebuffus (d. 1557), *Tractatus de decimis* (Antwerp 1615) Quaest. 13, nos. 43–4.

[44] Andreas Gail (d. 1587), *Observationes practicae imperialis camerae* (Turin 1595) Lib. II, Obs. 122.

[45] Matthaeus de Afflictis (d. 1510), *Decisiones sacri regii Neapolitani consilii* (Frankfurt 1616) Dec. 286.

[46] *Decisiones antique sacre Romanae Rotae*, No. 29.

[47] *Second Part of the Institutes of the Laws of England* (1642), Proeme, at end.

early Spanish jurist put it, 'Whenever there are *opiniones Doctorum* on any question, the question becomes a doubtful one.'[48]

It is fair and important to add that out of the jurists' discussion very often a *communis opinio* emerged. It might be dissented from, but only for weighty reasons.[49] No legal system can tolerate endless uncertainty, and the existence of such an academic consensus was one way the Roman canon law avoided, or at least minimized, that danger. None the less, it did tolerate a degree of disagreement and uncertainty greater than is consistent with the vision of an ordered system of statute law and appellate courts that both Maitland and Stubbs carried into their original controversy. More could be, and was, left open to doubt and discussion. More could be, and was, left open to local customary practice.

Whether a modern student finds this feature of the *ius commune* attractive or off-putting must depend to some extent upon personal taste. Certainly it had its critics at the time. One sixteenth-century jurist wrote of the learned law, 'The worst of all (its) vices is the uncertainty that proceeds from the disputations and opinions of the commentators.'[50] The humanists said worse.[51] Jeremy Taylor, the seventeenth-century English divine, who examined the canonical rule requiring all defendants to be legitimately cited as a representative example of the canonical rules discovered that, 'of this rule Porcius brings an hundred and sixteen ampliations and an hundred and four and twenty limitations'.[52] The books of the Roman and canon law, he concluded, were 'a laborious vanity, consumptive of our time and health to no purpose'.[53]

There was (and is) another side. All sophisticated legal systems

[48] Rodericus Suarez (fl. 1494), *Allegationes et consilia*, Alleg. 25, nos. 5–6, in *Opera omnia* (Frankfurt 1594): 'Nam quando super aliqua quaestione sunt opiniones Doctorum, ex hoc efficitur quaestio dubia. Opiniones enim Doctorum faciunt rem ambiguam.'

[49] See Helmut Coing, *Europäisches Privatrecht 1500 bis 1800* (1985) I:124–6; Luigi Lombardi, note 34.

[50] Nicolaus Vigelius (d. 1600), *Methodus universi iuris pontificii* (Basel 1577), Proem: 'Pessimum omnium vitium est ipsa legum canonumque incertitudo quae ex interpretum disputationibus ac opinionibus procedit.' See also Matthaeus de Afflictis, *Decisiones sacri regii Neapolitani consilii* (Frankfurt 1616), Dec. 1, nos. 11–14.

[51] Julian H. Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (1963) 18–58.

[52] *Ductor dubitantium* (1676), p. v.

[53] *Ibid.* p. viii. See also the interesting contrast, found in Strype's *Annals* *551, between the 'speculation' said to be characteristic of civilian studies and the more healthful certainty characteristic of the study of divinity.